

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN ROBERT DEMOS, JR.,

Petitioner,  
v.

## STATE OF WASHINGTON,

## Respondent.

CASE NO. C22-388 BHS

## ORDER DECLINING TO ADOPT REPORT & RECOMMENDATION

This matter comes before the Court on the Report and Recommendation ("R&R")

of the Honorable David W. Christel, United States Magistrate Judge, Dkt. 2, and

### Petitioner's objections to the R&R, Dkt. 3.

In March 2022, Petitioner, a bar-ordered litigant, filed a motion for leave to

proceed *in forma pauperis* (“IFP”) and an application to file a successive petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Dkts. 1, 1-1. On April 4, 2022, Judge

Christel issued the instant R&R, recommending that the Court dismiss the case without

prejudice because Petitioner did not move the appropriate court of appeals for an order

authorizing the district court to consider his successive petition. Dkt. 2. The R&R further

recommends that a certificate of appealability be denied. *Id.* Petitioner objects, arguing

1 that when a second or successive habeas petition is mistakenly submitted to the district  
2 court, the Ninth Circuit rules requires the district court to refer it to the court of appeals.  
3 Dkt. 3.

4 The district judge must determine de novo any part of the magistrate judge's  
5 disposition that has been properly objected to. The district judge may accept, reject, or  
6 modify the recommended disposition; receive further evidence; or return the matter to the  
7 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

8 The R&R is correct that a district court does not have jurisdiction to consider a  
9 second or successive petition absent authorization from the court of appeals. *Burton v.*  
10 *Stewart*, 549 U.S. 147, 152 (2007) (per curiam). But the Ninth Circuit Rules dictate that  
11 “[i]f an application for authorization to file a second or successive section 2254 petition  
12 or section 2255 motion is mistakenly submitted to the district court, the district court  
13 shall refer it to the court of appeals.” 9th Cir. R. 22-3(a). The Court will therefore refer  
14 Petitioner's motion to the Ninth Circuit under this Rule.

15 The Court having considered the R&R, Petitioner's objections, and the remaining  
16 record, does hereby find and order as follows:

- 17 (1) The Court **DECLINES** to adopt the R&R;
- 18 (2) Petitioner's motion to proceed *in forma pauperis*, Dkt. 1, and application  
19 for leave to file second or successive petition under 28 U.S.C. § 2254, Dkt.  
20 1-1, are **REFERRED** to the Ninth Circuit Court of Appeals;
- 21 (3) This case is **DISMISSED without prejudice**; and

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1 (4) The Clerk shall close this case and transfer all documents to the Ninth  
2 Circuit Court of Appeals.

3 Dated this 3rd day of May, 2022.

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6 BENJAMIN H. SETTLE  
7 United States District Judge  
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